BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUNIOR ALLEN BERRY, Deceased	)	
Claimant	)	
	)	
VS.	)	Docket No. 219,738
	)	
ACME FOUNDRY	)	
Self-Insured Respondent	)	

ORDER

Decedent's survivor requested review of the Awards dated February 25, 2002 and April 4, 2002 entered by Administrative Law Judge Jon L. Frobish[1]. The Board heard oral argument on October 2, 2002.

APPEARANCES

Jeffrey L. Syrios of Wichita, Kansas, appeared for the decedent's survivor. Paul M. Kritz of Coffeyville, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the April 4, 2002 Award.

ISSUES

Decedent was employed by respondent first as a maintenance worker and in 1995 was transferred to the melting department. In that position he worked as a weight changer. He then became a metal pourer and was set to begin his training on September 9, 1996. On that morning, he reported to work at 6:00 a.m. He had been training in that position for approximately 1-1/2 hours when he collapsed. A call was made to emergency services at 7:27 a.m. and an ambulance came to the plant. They transferred him to the hospital where he died within the hour. It is undisputed that decedent died of myocardial infarction and

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[1]An Award was originally entered on February 25, 2002. That Award failed to include four depositions taken on decedent's behalf. On March 18, 2002 decedent's counsel filed an appeal. Thereafter, on March 29, 2002 the Administrative Law Judge entered an Order rescinding and setting aside the February 25, 2002 Award. Another Award was then issued on April 4, 2002. A second Application for Board Review was filed on April 9, 2002.

resulting cardiac arrhythmia.

Following a trial, the Administrative Law Judge (ALJ) ruled decedent's heart attack and subsequent death on September 9, 1996 was not precipitated by his employment with respondent. Accordingly, recovery was prohibited by K.S.A. 44-501(e), commonly referred to as the Heart Amendment.

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Decedent's survivors have appealed this decision arguing first, that the heart attack was causally connected or related to the work he was doing on the date of his death and second, his job as a metal pourer required more exertion necessary than his prior job as a weight changer. If those two elements are met, decedent's survivors are entitled to benefits under the Kansas Workers Compensation Act, K.S.A. 44-501, et seq. (Act).

Respondent contends the ALJ appropriately denied the claim finding the job performed by decedent on September 9, 1996 was neither the precipitating factor which led to his heart attack nor did the work he was performing on that date require more exertion than his regular job as a weight changer. Thus, the respondent argues, the ALJ's decision should be affirmed.

The issues for decision by the Board is whether the decedent's heart attack arose out of his employment and if this claim is barred by Heart Amendment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The Board finds the ALJ's findings and conclusion are accurate and supported by the law and the facts contained in the record. The Board approves those findings and conclusions and adopts them as its own.

Compensability in this case is governed by K.S.A. 44-501(e) which provides as follows:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment. (Hereinafter referred to as the "Heart Amendment")

This statutory provision requires two separate elements to be shown. The decedent must establish that his heart attack was causally connected or related to his work activities on

September 9, 1996 ***and*** his physical exertion on that date was more than was usually required of him in the course of his job. The purpose of this legislation "was to limit compensability for heart and stroke cases and reverse a long line of Supreme Court decisions in which compensation was awarded even though preexisting heart or vascular conditions may have been a predisposing factor. *Mudd v. Neosho Memorial Regional Medical Center*, 275 Kan.187, 62 P.3d 236 (No. 89,091 (January 24, 2003))(citing *Dial v. C.V.Dome Co.*, 213 Kan. 262, 266-267, 515 P.2d 1046 (1973); *Nichols v. State Highway Commission*, 211 Kan. 919, 923, 508 P.2d 856 (1973)).

Whether causation is present seems to be the threshold issue. See e.g. *Chapman v. Wilkenson Co.*, 222 Kan. 722, 727, 567 P. 2d 888 (1977)("Where there is no causal connection between the workers exertion and the injury, the question of whether the exertion was unusual within the meaning of the heart amendment is irrelevant.")(citations omitted.)

In *Muntzert v. A.B.C. Drug Co.*, 206 Kan. 331, 478 P.2d 198 (1970) the Kansas Supreme Court was presented with the first dispute after the Heart Amendment was enacted. However, the statute was neither applied nor construed because the evidence failed to prove a causal relationship between the decedent's heart attack and his employment. Based upon the evidence presented in this case, the same can be said here.

The evidence on causation is addressed by two cardiologists, neither of whom treated decedent. Dr. Layne Reusser opined that if the work decedent was performing on September 9, 1996 was more strenuous due to the heat, given decedent's condition and health risks (diabetic, overweight, hypertensive, prior heart attack, high "bad" cholesterol and smoker) he was more likely to have a myocardial infarction and "in that sense, certainly it could have been a contributing factor to his acute event and ultimate demise." (Reusser dep. Ex. 3) However, Dr. Reusser was unwilling to say, based on a reasonable degree of medical probability, that the exertion involved in the metal pouring position "caused" the heart attack. Instead, he was only willing to say that exertion played a causative role in the heart attack *if* decedent had gone from a sedentary position to a position requiring heavy exertion. (Reusser dep. At p. 46, 47) Dr. Reusser concedes that it is possible that had decedent slept in that morning, or had gone fishing or remained in his job as a weight changer, the heart attack might still have occurred.

Dr. Donald Vine was also asked to comment on the causative aspect of decedent's heart attack. Dr. Vine believes the likely scenario is that decedent ruptured a piece of plaque within an artery that caused a chemical chain reaction. As the plaque ruptured, the body attempted to seal off the rupture by clotting. Chemicals are then introduced by the body to minimize the clotting. Eventually, the clotting overwhelmed his system by blocking the blood flow thus causing a myocardial infarction. This rupture could have begun that morning or as early as the night before. According to Dr. Vine, "there could have been a causal relationship" between the physical activities of September 9, 1996 and decedent's

heart attack. (Vine dep. p. 58). Beyond that, he could not state that decedent's exertion on that date was the proximate cause of the heart attack.

After considering both these physicians' testimony, the Board remains unpersuaded that the evidence sustains decedent's burden or proof on the issue of causation.

Even assuming the heart attack was caused by decedent's work, there must also be a showing that the work performed was greater than that which decedent was accustomed to performing in his regular job. Our Supreme Court has indicated the standard for deciding what is unusual exertion for purposes of the Heart Amendment is the work history of the individual involved. See *Mudd v. Neosho Memorial Regional Medical Center*, supra; *Chapman v. Wilkinson County*, 222 Kan. 722, 567 P.2d 888 (1977). The "unusual" may be a matter of degree and may appear in the duration, strenuousness, distance or other circumstances involved in the work. *Chapman*, 222 Kan. at 728, 567 P.2d at 728, citing 1A A. Larson, *The Law of Workmen's Compensation*, § 38.64(a)(1973). Whether work is construed as "usual" or "regular" generally depends upon a number of facts and circumstances, among which the daily activities a workmen may be one, but only one among factors. *Nichols v. State Highway Commission*, 211 Kan. 919, 508 P.2d 856 (1973).

In *Nichols*, the claimant normally performed road maintenance work, including mowing, truck driving, flagging, snow and ice removal, repairing guardrails, installing snow fences and filling highway cracks. From May to frost of each year, he normally mowed, spending the balance of the year doing whatever was required. Claimant became ill when he was walking the highway filling in cracks with liquid tar and later died. The *Nichols* Court addressed the Heart Amendment and identified a number of factors to be considered in deciding the unusualness of an employee's work exertion. These factors include the daily activities of the decedent, the nature of his employment, the employee's classification, the variety of tasks performed along with the seasonal character of the work. *Nichols*, 211 Kan. at 925-26, 508 P.2d at 925. In *Nichols*, it was ultimately determined that the claimant's work was not more than what he usually performed and as such, his claim was barred by the Heart Amendment. Id. at 925.

In this instance, decedent's job over the previous 13 months and up until the day of his death required him to be in the melting department regularly working eight hour shifts in close proximity to molten metal being poured into molds in his position as a back weight changer. He and his co-workers worked at a brisk pace during the first hour or so of each morning shift. As a weight changer, decedent's job was to make sure the iron pourers have empty molds for the iron. While he did not have to stand over the hot molten iron for extended periods of time, his work area was nevertheless quite warm and he was required to intermittently be in close proximity to molds filled with molten or cooling iron. He would change out the molds with the aid of hydraulics pushing a lever up and down and return the molds to the pourers. The pace of this work gave him frequent and consistent short

breaks.

In contrast to those duties, on September 9, 1996, he began training as an iron pourer. He reported to work at 6:00 a.m. and according to Scott Carpenter, spent a good portion of the first hour watching the pour. During this first part of the day, there are four iron pourers working to get the molds filled and in production. This requires the iron pourers to retrieve a ladle full of hot iron and walk the 500 pound ladle up the ramp to the pouring position. The pourers, along with the weight changers, are working at a brisk pace during this first part of the shift. After the initial pours are done, there are only 2 ladles actively pouring at any one time. The pouring of the hot, liquid metal was done manually although the ladle itself was suspended by a hydraulic lift. When the ladle was empty it would have to be taken back down the ramp and refilled.

According to Karen Terrill, the maximum effort needed to push this ladle up the ramp is 62.3 pounds. This job requires periods of guiding and pushing/pulling the large ladle with the upper body as evidenced by a videotape made by Ms. Terrill. According to Mr. Carpenter, this job used more upper body strength and muscles than the job of a weight changer. The iron pourers must wear protective clothing that undoubtedly makes the hot temperatures of the plant even more uncomfortable. Ms. Terrill measured the temperature just above the hot iron at 114 degrees Fahrenheit. On the morning of September 9, 1996, the outside temperature was recorded as in the 70's. There was no evidence as to the ambient temperature where the back weight changer was stationed on that or any other date.

There is some evidence in the record to suggest other workers believed the iron pouring job was a more stressful, more difficult job when compared to the job of weight changer. Scott Carpenter testified that a weight changer's job is not as hot and more consistent in the work flow while the iron pourer works for sustained but sporadic periods of time.

On September 9, 1996 decedent watched this process until Mr. Carpenter was able to give him an opportunity to try. With Mr. Carpenter overseeing, decedent was allowed to pour iron into the molds with the aid of the electric hoist. Decedent expressed confidence in his abilities and according to Mr. Carpenter, even admitted pouring iron in a previous job. So, Mr. Carpenter left to take a break. During his absence, decedent apparently began to feel ill and sat down. He may or may not have lost consciousness. He was observed to be perspiring, although his friend, Ken Phillips, who noticed this also commented that decedent would always sweat while working. According to emergency medical personnel, decedent indicated he had gotten overheated and had never before performed that job.

Based upon this evidence, the Board is not persuaded that the job decedent was performing on September 9, 1996 was significantly different. The ALJ stated that "[a]lthough there may have been some difference in the jobs, the weight of the testimony

demonstrates that there was not a significant difference." (Award, p. 3-4) As both the ALJ and one of the physicians noted, had decedent regularly been employed as a sedentary office worker who, even with his risk factors, started this job on September 9, 1996 and sustained a heart attack and died, there would be little doubt that the exertion necessary to the job would have precipitated the heart attack. That is not the case here, however.

Until the day before he died decedent worked as a weight changer, in the very same area as the iron pourers. He worked in this heated environment at the same quick pace each morning preparing and delivering the molds to the iron pourers. The physical mechanism for each job may well be slightly different but the inescapable fact is that both jobs required working in a very hot environment, using hydraulics, and requiring upper body movements, all the while taking breaks as allowed by the pace of the work. The nature of the jobs are very similar and there is nothing within the record that suggests that September 9, 1996 presented a situation for decedent that required an unusual amount of exertion in order to complete the job as iron pourer. It is unfortunate that he sustained a fatal heart attack. Nonetheless, it does not appear that the heart attack was attributable to any unusual exertion associated with his work activities on September 9, 1996.

Independent of the finding above, the Board finds that the record fails to establish the heat was a substantial causative factor in the decent's heart attack. The Kansas Supreme Court has ruled that when unusual exertion is not established, a heart attack decedent could prevail by instead showing an "external force" was the precipitating cause of the disability. See *Dial v. C.V. Dome Co.*, 213 Kan. 262, 266, 515 P.2d 1046 (1973). Whether an external force or agency produced a worker's disability is a question of fact. *Suhm v. Volks Homes, Inc.*, 219 Kan. 800, Syl. 4, 549 P.2d 944 (1976). The required elements for "external force" are as follows:

> To support a finding that claimant's cardiac or vascular injury is the product of some extreme external force, [1] the presence of a substantial external force in the working environment must be established and [2] there must be expert medical testimony that the external force was a substantial causative factor in producing the injury and resulting disability.

Makalous v. Kansas State Highway Commission, 222 Kan. 477, 484-85, 565 P.2d 254 (1977).

In this case Dr. Ruesser testified that the heat was only a contributing factor among many others. Neither he nor Dr. Vine were able to say the heat was a *substantial causative factor* of the myocardial infarction. For this reason, the Board finds there is an absence of proof necessary to establish that heat constituted an "external force" which caused the decedent's heart attack.

There is one last issue to address. The ALJ originally issued an Award on February 25, 2002. That document did not include several depositions taken by claimant. That

Award was appealed on March 18, 2002 thereby divesting the ALJ of any jurisdiction to act. Then an Order was entered rescinding and setting aside the February 25, 2002 Award and was followed thereafter by another Award, which is identical in presentation in every respect other than it includes the complete list of the record, including the depositions originally excluded from the earlier Award.

The ALJ had no jurisdiction to set aside the February 25, 2002 Award after an appeal was filed. However, because the Board conducts a de novo review of these matters, no further remedy is required.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated February 25, 2002 and the subsequent Award dated April 4, 2002, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffrey L. Syrios, Attorney for Decedent's Survivor
Paul M. Kritz, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director